

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1085

To be argued by
JAMES ROBERT YON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1085

UNITED STATES OF AMERICA,

Appellee,

—VS.—

SEBASTIAN INTERSIMONE,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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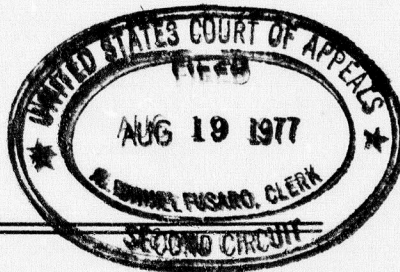


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Questions Presented for Review

I

Whether, the Prosecution Proof Suffered the Error of Variance From the Pleading, and, whether, in denying Intersimone's Motions for Severance, his right to a Fair Trial was Substantially Affected by the Mass Trial Format and by the Extraneous and Prejudicial Spillover Evidence.

II

Where the Evidence Indicated only a Single Transaction, whether it was sufficient to Sustain the Charge.

III

Whether, Admission into Evidence of Prior Similar Acts constitutes Reversible Error.

IV

Whether, the District Court Abused its Discretion in Denying Appellant's Motion for Summary Judgment of Acquittal.

V

Whether, it was an Abuse of Discretion for the Trial Judge to Leave the Issue of John T. Brown's Credibility to the Jury Without the Aid of Expert Psychiatric Examination.

VI

Whether, certain prosecutorial acts constituted misconduct to such a degree as to deny Appellant a Fair Trial.

VII

Whether appellant was denied a trial by a fair and impartial jury.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1085

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
—vs.—

SEBASTIAN INTERSIMONE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

Statement of the Case

This is an appeal by Sebastian Intersimone from a judgment of conviction entered on January 31, 1977, in the United States District Court for the Southern District of New York after a thirteen week trial before the Honorable Richard Owen, United States District Judge, and a jury.

Intersimone was arrested on April 21, 1976, as a result of an indictment returned in Case No. 76 CR 324.¹

¹ According to the docket entries, the indictment was filed April 5, 1976, and ordered sealed. On April 20, 1976, the indictment was ordered unsealed and then ordered resealed the same date. On April 21, 1976, the indictment was again unsealed after the arrest of all but two of the previously unjailed defendants.

The indictment charged Intersimone and thirty-two other defendants in forty counts with various violations of the federal narcotics laws. Specifically, Intersimone was charged as follows:

(1) Count One charged Intersimone and thirty-two other defendants with conspiracy to violate the narcotics laws of the United States from January 1, 1968, until the date of the filing of the indictment, April 5, 1976, in violation of Title 21, United States Code, Sections 173, 174, and 846; (A 7-13)

(2) Count Twelve charged Intersimone with unlawful distribution and possession with intent to distribute heroin, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 831(b)(1)(A) (A 22).

Trial commenced on August 10, 1976, as to twenty-two² defendants³ on a redacted thirty-count indictment⁴ (A 32-54).

² Four defendants, John Capra, Leoluca Guarino, Steven DellaCava, and Helen Kellum were severed prior to trial. A fifth defendant, Solon Glaze, was severed during the jury selection due to illness in his attorney's family. Three defendants, Luis Sureda, Michael Parker, and Ann Reynolds pleaded guilty and testified for the Government at trial. Two defendants, Eduardo and Lazaro Yaujar, convinced the Government prior to trial that they had no knowledge that their activities were drug related, and the Government filed *nolle prosequis* with respect to both defendants. One defendant, Al Williams, a/k/a "Big Al from Chicago," has never been apprehended and is presently a fugitive.

³ A principal defendant, Juan Antonio Alvarez, was tried *in absentia* under the authority of *United States v. Tortora*, 464 F.2d 1202 (2nd Cir.), *cert. denied*, 409 U.S. 1063 (1972).

⁴ Six counts of the original indictment charged defendants not on trial with substantive violations of the narcotics laws, and these counts were severed. Four substantive counts were dismissed at the close of the Government's case.

On November 12, 1976, after lengthy deliberations, the jury returned a guilty verdict against Intersimone on both counts.⁵

On January 31, 1977, Judge Owen imposed the following sentences upon Intersimone, all of which were concurrent excepting the Special Parole:

- (a) Count One: 15 years imprisonment and \$25,000 fine;
- (b) Count Two: 15 years imprisonment;
- (c) Three (3) years Special Parole to follow.

According to the docket entries, Intersimone filed his Notice of Appeal to his conviction on February 4, 1977, with subsequent motions to stay and consequent order to file Brief and Appendix by August 1, 1977.

As used in this Brief, "Tr." refers to the trial transcript; "GX" to the Government Exhibits at trial; and "A" to the Appendix of Appellant.

Statement of the Facts

I. The Indictment

The indictment is a twenty-five page document, naming thirty-three defendants, all but five of whom are alleged to have an alias or aliases. The conspiracy count allegedly covers a period of just under eight years from January 1, 1968, to April 5, 1976, the date of the filing

⁵ Seventeen defendants were ultimately convicted of some or all of the charges against them, and four defendants were acquitted. The jury was unable to reach a verdict as to one defendant, Bernard Brightman, and a mistrial was declared. Brightman was subsequently retried alone in February, 1977 and was acquitted of all charges.

of the indictment. The indictment contains forty-seven overt acts and forty substantive counts.⁶

Under the heading, "Importers and Sources of Supply," Intersimone is identified as a "supplier of heroin doing business in New York City." In Overt Act Eleven, Intersimone is alleged to have sold four kilograms of heroin in the Fall of 1971. This "sale" apparently forms the basis for Substantive Count Twelve, the only other count in which Intersimone is named. The only other mention of Intersimone occurs in Overt Act Forty-Seven wherein it is alleged that Intersimone had a conversation with another person in March, 1975.

The forty-seven overt acts consist of twenty-nine acts relating to cocaine in the total approximate amount of two hundred twelve kilograms; six overt acts relating to heroin in the total approximate amount of nine kilograms; one overt act relating to both cocaine and heroin; and eleven overt acts which mention neither drug.

The forty substantive counts consist of thirty-five counts relating exclusively to cocaine and five counts relating exclusively to heroin.

Other alleged importers and suppliers of heroin in addition to Intersimone are Capra, Guarino, and Della-Cava, who are listed separately from Intersimone.

The other importers and suppliers named in the indictment are suppliers of cocaine: Juan Antonio Alvarez, Angel Rodriguez and Jose Luis Sureda, all of whom are from Miami, Florida but who are alleged to have done business in New York City and Miami.

⁶ The indictment was subsequently reduced to thirty counts. See discussion at N. 4, *infra*.

Four charts are submitted which clearly show the relationships among the members of the alleged conspiracy together with the actual finding of the jury (A 139).

The indictment reveals that eighteen of the thirty-three defendants are named either in Overt Acts or Substantive Counts as dealing with *cocaine* only: Alvarez, Rodriguez, Sureda, Glaze, Mitchell, Morris, Brightman, Moten, Wilson, Cowpers, Parker, Davis, Laws, Morgan, Dunmore, Jones, Kellum and Bonilla.

Another five defendants are mentioned only in relation to *heroin*: O'Dood, Capra, Guarino, DellaCava and Intersimone.

Of the remaining ten defendants, seven are alleged to have dealt to some extent in *both* heroin and cocaine. Five of these are apparently from the Washington, D.C. area; Sidney Foster, William Hightower, Lois Sampson and Joseph Sampson. Also charged were Ann Reynolds and Al Williams.

The remaining defendant who allegedly dealt in both cocaine and heroin is from Chicago, Illinois; Yvonne Schennault.

The remaining three defendants, Nelson Alvarez, Eduardo Yaujar and Lazaro Yaujar were allegedly members of the Miami-based "Cocaine Connection".

The Government alleged that the "Miami Cocaine Connection" sold cocaine in both Miami and New York. Schennault is alleged to have purchased, with others, three kilograms of heroin in New York and substantial amounts of cocaine in both Miami and New York. The Washington Group allegedly purchased both heroin and cocaine in New York and Intersimone and the Capra Group allegedly sold heroin in New York, separately.

There is no allegation in the indictment that Intersimone ever had dealings with the "Miami Cocaine Connection", the Washington Group or the Capra Group, nor is Intersimone alleged to have had any dealings with cocaine. The only allegation in the indictment is that Intersimone *once*, in the Fall of 1971, sold heroin to some unnamed person.

II. Pre-trial Motions

(A) Discovery

On May 21, 1976, Intersimone filed his Notice of Motion for an Order directing that certain discovery be granted. Intersimone moved the District Court pursuant to Rule 16(a)(1)(C) of the *Federal Rules of Criminal Procedure* to produce, "All checks, money orders, bank books, etc." (A 63-85). At the time the Government responded to Intersimone's discovery motion, it failed to respond to Intersimone's request for material pursuant to Rule 16(a)(1)(C), *supra*. The Government at trial introduced a check into evidence against Intersimone which had apparently been obtained by Government counsel via an Internal Revenue subpoena prior to the commencement of trial (GX 42).

Intersimone's trial attorney subpoenaed a criminal file of the Government's key witness in the case, John T. Brown, along with other related material, only to learn several weeks after filing the subpoena that the criminal file of Brown had been destroyed (A 113-124).

(B) Severance

Intersimone moved prior to trial for severance of the indictment, urging the District Court to subdivide the indictment, or to exercise its supervisory power by requiring the Government to make such an election.

Intersimone, pursuant to Rule 8(b) of the *Federal Rules of Criminal Procedure*, contended that there were compelling indicia that the acts charged in the indictment should be viewed more reasonably as encompassing two or more conspiracies. Besides the thirty-three defendants named in the indictment, the Government's Bill of Particulars named an additional seventeen persons, thus increasing the number of alleged criminal participants to fifty.

Intersimone asserted that even were the Government to prove all its allegations, it would be apparent that what was occurring between the years of 1968 and 1976 was not a single conspiracy, but three distinct and unrelated conspiracies: (1) the cocaine conspiracy; (2) the heroin conspiracy; and, (3) the heroin and cocaine conspiracy.

As Intersimone asserted that the Government's case centered around the activities and testimony of unindicted co-conspirator, John T. Brown, the wholesaler and middleman who was the hub from which the defendants and conspirators of the three conspiracies radiated, either as suppliers or purchasers.

According to the docket entries, an opinion of the District Court (#44673) was filed June 29, 1976, wherein the court denied Intersimone's severance motion, along with all other defendants, with the exception of certain co-defendants including Capra, Guarino and DellaCava.⁷

⁷ John T. Brown, key Government witness, was charged in indictment 73 Cr. 331, filed in the U. S. District Court for the Southern District of New York on April 13, 1973, with conspiring with John Capra, Leoluca Guarino and Steven DellaCava to violate the federal narcotics laws. Brown testified in the instant trial that he read about this indictment (73 Cr. 331) and the arrest of Capra, Guarino and DellaCava on April 15, 1973 in the *New York Times*. Brown thereafter became a fugitive (Tr. 1359-1360). Capra, Guarino and DellaCava were ultimately tried

[Footnote continued on following page]

Thus, Intersimone was left alone in the heroin supplier category at trial even though the Government produced great amounts of evidence and exhibits which dealt exclusively with the alleged activities among severed co-defendants Capra, Guarino and DellaCava and other co-defendants. One of the exhibits produced during the course of the trial was the "Capra Tapes", such tapes being well-known to this Court by previous appellate litigation.⁸

The District Court rejected the argument made by Intersimone that, irrespective of whether single or multiple conspiracy was charged, the joint trial of such a massive indictment would subject the defendants to the substantial risk of prejudicial "spillover" from the testimony and evidence relating to tangentially-related co-defendants.

III. Mass Trial

Twenty-two defendants were ultimately tried on the theory that there existed a single conspiracy to import and sell in excess of 211 kilograms of cocaine and 11

and convicted in 73 Cr. 331 on all counts. This Court, in *United States v. Capra*, 501 F.2d 267 (2nd Cir., 1974), reversed the conviction of Count One (conspiracy) as to Capra, Guarino and DellaCava and affirmed their convictions as to Counts Two through Five, the substantive counts. The Government ultimately *nolle prosequi* Count One against the trio and in 1974, dismissed the entire indictment against Brown. Furthermore, in the instant case, the Government filed a *nolle prosequi* against defendants Capra, Guarino and DellaCava, one month post-trial, on December 28, 1976. For a discussion of the other severed co-defendants, see N.2, *infra*.

⁸ *United States v. Capra*, 501 F.2d 267 (2nd Cir., 1974). In this case, this Court reversed the convictions of Capra, Guarino and DellaCava for Count One (conspiracy—73 Cr. 331), because certain of the tapes were obtained illegally and should have been suppressed, an action this Court ultimately carried out.

kilograms of heroin, having as its source, South America and other countries; with its ultimate terminus in New York City and thereupon to be sold in other cities as well. The time frame of the conspiracy extended from January, 1968 to April, 1976.

In its opening statement, the Government averred to the jury that defendants Juan Alvarez and Frank Moten ran their own organizations (Tr. 522) (A 186), and also that two other conspiratorial groups were involved, one supplying heroin and the other supplying cocaine (Tr. 524) (A 188).

IV. The Government's Case Offered Against Intersimone

A. Introduction

The evidence offered by the Government against Intersimone can be classified into two categories: evidence which is directly probative of the criminal acts charged to Intersimone in the indictment; and evidence of prior similar activities. The direct examination of John T. Brown spans five hundred thirty-two pages of trial transcript. Of these five hundred thirty-two pages, only *fifty-two* of them contain testimony specifically relating to Intersimone. Of these fifty-two pages, thirty-eight of them contain testimony which wholly relate to prior similar activities, leaving *fourteen* pages of trial transcript relating to activities of Intersimone which allegedly transpired during the *seven* years of the conspiracy charged. The evidence offered against Intersimone was primarily directed to prior similar activities commencing prior to January 1, 1968. The first specific activity charged to Intersimone is stated as follows: Defendant Intersimone "was a supplier of heroin doing business in New York City." No specific dates were mentioned, although the testimony of John T. Brown alluded to a fifteen-year relationship between himself and Intersimone.

B. The Chief Witness: Unindicted Co-conspirator, John T. Brown

Brown was born in Washington, D.C., in 1928 where he lived until 1954. By that time he had had a series of arrests and convictions, beginning in 1944, for shoplifting and possession of narcotics. Brown testified that he was addicted to heroin from 1946 until 1954 or 1955, when he served a six-month sentence at Rikers Island jail after which he decided to break his habit. Thereafter, Brown allegedly never used heroin intravenously, although he occasionally "snorted" heroin when depressed and frequently, on an almost daily basis, "snorted" cocaine.⁹

Brown began selling drugs in New York in the 1950's. He lived for a time in a rooming house on 126th Street, where he met some of his later associates in crime. In 1950, Brown was arrested and convicted in Washington, D.C., for violating the federal narcotics laws.¹⁰ He was incarcerated in the Atlanta federal penitentiary where he met, among other people, Leoluca Guarino, who in 1970 became one of his principal heroin suppliers. Brown was released from the Atlanta penitentiary in July of 1964, and returned to New York City where he committed a series of burglaries with an associate named Antonio Perdiz. By 1965, Brown was back in the business of selling heroin and cocaine, a trade he maintained until 1975 (Tr. 987-995; 999-1000; 1182) (A 189-197; 237).

⁹ Even while Brown was in the protective custody of the Federal Government after his surrender in April, 1975, he committed drug violations by receiving heroin and by possessing cocaine which had been smuggled into him (Tr. 1660-67).

¹⁰ Intersimone attempted to gain possession of the case file in this case by way of subpoena prior to trial, only to learn later that the file had been "routinely" destroyed (A 113-124).

Brown's mental state was constantly in question throughout the trial, and the evidence showed Brown's behavior to be not only conclusively eccentric, but extremely "paranoid" and unstable. The Government in its direct and re-direct examination, and defense counsel in seven days of cross-examination, and one of re-cross, brought out Brown's erratic and abnormal behavior.¹¹ These included Brown's prolonged period of heroin addiction and cocaine use; his constant possession of weapons, including silencers; his admission that he often saw things move and heard voices under the influence of cocaine; his shooting through a door because he constantly believed that someone was "after him;" his pistol-whipping of a car salesman for insulting one of his girl friends; his flushing three kilograms of cocaine down the toilet because he believed that they had been poisoned; his belief that Michael Parker, his son-in-law, was a hired killer, and, indeed, his belief in the existence of laser beams able to see through concrete walls and put an image on a television screen.¹²

¹¹ Part of Brown's cross-examination related to a two-page letter written by Brown to the FBI, prior to his surrender, in which he claimed that certain of his associates were trying to kill him. Portions of the letter, with certain names omitted, were read to the jury (GX 3505 W; Tr. 2230-35). Some time thereafter, one of the defense counsel requested, *ex parte*, that the court authorize funds for a psychiatrist to evaluate the letter from a clinical point of view. The trial judge approved the payment, and the letter was submitted to Dr. Harvey Greenberg for study. Thereafter, defense counsel asked the trial judge for further application of CJA funds to retain a psychiatrist to read Brown's trial testimony and other information in order to reach a judgment which could form the basis of an offer of proof (Tr. 4009-4013). The trial judge denied not only the additional funds, but also denied the use of expert psychiatric testimony even if such funds had been approved.

¹² According to the record, Brown was taking medication by prescription, Mellaril, Valium and Thorazine, during the time he was in federal protective custody.

**C. John T. Brown, Key Government Witness,
Testifies Against Intersimone**

(A) Pre-conspiracy (1959-1965)

Brown testified that in 1959, a friend of his, Jimmy Richardson, approached him by asking if Brown was interested in meeting another heroin connection. According to Brown, he told Jimmy that he was, but that he would first need to consult with his partner, Glennard Spearmann, a/k/a Mojo before making a commitment.¹³ Brown testified he consulted with Mojo, and they agreed to meet the new heroin connection. This information was relayed to Richardson by Brown that he and Mojo were interested. According to Brown, Richardson, upon being told of the interest to meet the new connection, advised Brown and Mojo that he would make the arrangements for the meet, and, after making the arrangements, would get back to Brown at a later date.

According to Brown, Richardson contacted him several days later and advised him everything was ready, and that Brown and Mojo should meet him at his grocery store. Brown testified that he and Mojo went to Richardson's store, and, were told by Richardson they were to follow Richardson in their car. The trio, in separate vehicles proceeded to Pepe's Bar where they all went inside and ordered a drink. Brown testified that as the three were drinking, a fellow entered the bar and came over to where they were sitting. According to Brown, Richardson at this time introduced to Mojo and Brown, "Mr. B." Brown testified Mr. B. told the owner, Anthony Samino,¹⁴ that he wanted to use the back of the store. Brown accompanied Mojo, Richardson, and Mr. B. to the back of

¹³ Testimony and evidence at trial disclosed that both Spearmann and Richardson died of heart attacks.

¹⁴ Deceased as a result of a heart attack.

the store where Mr. B. told Brown that they came "well recommended" so that was good enough for him. Brown testified the foursome discussed heroin and the price of heroin. According to Brown, Intersimone related to them that he was in a position to get them what they wanted and would stand behind it 100 percent. Brown testified a price and quantity for the initial transaction was then agreed upon, and after the discussion in the back of the bar was over, the foursome went back into the main area of the bar where Intersimone told Brown and Mojo that Richardson would get in touch (Tr. 999-1004) (A 198-203).

Brown testified that within 72 hours of the meeting in Pepe's Bar, Richardson called him and told him to come uptown. Brown called Mojo and they both met Richardson shortly thereafter. Brown testified he and Mojo followed Richardson in their car where they proceeded to the East Side of New York City. According to Brown, after the three of them reached the vicinity of A & B Avenues, Richardson parked his car with Brown and Mojo parking directly behind in their car. Brown testified he and Mojo then gave Richardson a brown paper bag which contained fifteen to sixteen thousand dollars in small bills. According to Brown, Richardson then left with the bag of money and returned approximately forty-five minutes later in the company of Intersimone. Brown testified Richardson then got into his car and drove off. Brown testified Intersimone then got into Brown's car along with Mojo and himself, and the trio drove around while Intersimone explained that in the future, the same procedure would be used, and that if Brown wanted something, he should contact Richardson. According to Brown, Intersimone then gave him a brown paper bag containing one kilogram of heroin (Tr. 1004-1008) (A 203-207).

Brown testified after he and Mojo received the heroin from Intersimone, he and Mojo went to Mojo's apartment

on 85th Street where the two of them tested the heroin (Tr. 1019-1022) (A 210-213).

According to Brown, two or three weeks after his first purchase of heroin from Intersimone, he again met with Intersimone at 10th or 11th Street where he received two kilograms of heroin.¹⁵

Brown testified he considered Intersimone a "very close" friend (Tr. 1024-26) (A 215-217), and that he and Intersimone met socially on numerous occasions prior to Brown's incarceration in the Atlanta federal penitentiary in 1960.

According to Brown, after his release from the Atlanta federal penitentiary in July, 1964, he called Intersimone. Brown testified that during this renewal of friendship meeting, Intersimone gave him fifty dollars and told Brown that he wished it could be more. Brown testified he saw Intersimone "quite often" after this meeting.

Brown testified that in the latter part of 1964, or 1965, he met with Intersimone at Brown's apartment on 14th Street where Intersimone told Brown that "he had scored again," and for Brown to get some money together. A meeting place was arranged in the vicinity of Beth Israel Hospital in New York City. Intersimone called him the next day and pre-arranged a time to meet. Brown overslept the next morning and was awakened by his wife, Jan, who told him that Intersimone was on the phone. Brown testified that Intersimone told him over the phone to meet him immediately at the designated place. After getting dressed, Brown walked to the vicinity of Beth Israel Hospital carrying on his person a large amount of cash. Upon arriving at the designated place,

¹⁵ Even though Brown testified he paid Intersimone for these two kilograms, no amount for the purchase appears in the record.

he saw Intersimone in a car in the company of another person whom he was unable to identify. Brown got into the car with Intersimone and the unidentified person. As they were driving around, Intersimone gave him one kilogram of heroin. After he had received the one kilogram of heroin from Intersimone, Brown got out of the car at 14th Street and First Avenue and walked to his apartment. According to Brown, he tested the heroin after he arrived at his apartment (Tr. 1028-1033) (A 218-223).

In the years after 1965, Brown saw Intersimone, "on a average of once a week," either in Intersimone's apartment or in several New York City bars, each meeting lasting approximately forty-five minutes to an hour in length. Brown testified that during one of these meetings, he discussed his drug dealings with Patty Pontiac, Jenks, Joe Paradise, and Flo Isabella. Intersimone told him not to do business with anybody from Pleasant Avenue, "because people of that neighborhood would cross Brown easy" (Tr. 1138-1142) (A 224-228).

(B) Conspiracy Testimony (1969-1976)

Brown called Intersimone on a day in 1969, and told him, "it was urgent" that he see Intersimone right away. Intersimone met him later that same day in the vicinity of Beth Israel Hospital at which time Brown told Intersimone that he was completely out of heroin, and if Intersimone could "reach out", he would appreciate it.

Intersimone called him several days later and told him to come to his apartment. Brown went to Intersimone's apartment and whistled up to Intersimone from the street. Intersimone tossed the keys to the entrance of the building down to Brown so that he could enter. Brown met Intersimone on the stairs after he had entered the building, at which time Intersimone handed a package to Brown for which Brown gave Intersimone an undisclosed amount of cash. Brown took the package back to his apartment where he immediately placed it into his drug "stash" without first testing the contents.

Brown testified that three days later, after he had received a request for heroin from one of his customers, he took the package that Intersimone had given to him out of his "stash". According to Brown, when he opened the package, he found it to contain Epsom Salts. Brown immediately called Intersimone and complained about the mix-up and Intersimone told him that "he would make it up" (Tr. 1143-1144) (A 229-30).

Intersimone moved to Accord, New York in 1970. In the Fall of 1971, Brown received a telephone call from Intersimone who told him to stay close to home for the next few days. Intersimone came to Brown's apartment at 180 West End Avenue in New York City the day following his telephone call. Intersimone carried a briefcase and a brown paper bag. Intersimone told him that he had scored for some heroin and that he was giving Brown first-choice. Intersimone then gave him four kilograms of heroin which Brown sold over a period of months to customers in New York and Washington, D.C.¹⁶ According to Brown, he was unable to pay Intersimone the full amount for the four kilograms of heroin at the time of its delivery.¹⁷ Intersimone met Brown in the succeeding weeks at various locations in upstate New York near Intersimone's house in Accord. Brown made payments for the four-kilo transactions. Intersimone also made trips to Brown's apartment in New York City to

¹⁶ According to Brown on direct, the recipients of this heroin, which he mixed with heroin he had earlier purchased from Capra, Guarino and DellaCava, were co-defendants William Hightower, Sidney Foster, Joseph Sampson, Lois Sampson, Tommy Davis and acquitted co-defendant, Marion Dunmore (Tr. 1147-1149). However, on cross-examination it was revealed that Brown had earlier told DEA agents he simply "passed [the heroin] on" without mixing or testing it.

¹⁷ On re-cross examination, however, Brown testified that Frank Moten was holding around \$100,000 or better for him, and that he had thousands of dollars at his disposal in safety deposit boxes at the time of the four-kilo transaction (Tr. 3058-59).

pick up payments, with the payments being completed in January, 1972 (Tr. 1144-1147) (A. 230-233).

On one occasion in the latter part of 1971, Intersimone came to his apartment to pickup a payment. When Intersimone arrived for the money, Frank Moten, also a defendant on trial, was at Brown's apartment. Brown introduced Intersimone to Moten for the first time (Tr. 1263) (A 238).

During the latter part of 1971, Intersimone wanted to know if Brown could get some money exchanged for him and Brown told Intersimone that he would try (Tr. 1265) (A 239). Brown spoke to Frank Moten about this matter sometime later, who, according to Brown, agreed to arrange a \$20,000 exchange from one of Moten's associates in Boston, Peter Fiumara. Brown and Moten made a trip to Boston in April, 1972, where together they visited Fiumara. Moten explained to Fiumara the purpose of their visit, and Brown gave Fiumara \$20,000 in cash, Brown's own money that he had brought with him from New York for the exchange. Fiumara then gave him a certified check in the amount of \$20,000 dated April 12, 1972, made payable to Sebastian Intersimone (Tr. 1265-68; GX 42) (A 239-242).¹⁸

¹⁸ Phillip B. Kerschen, Special Agent for the Internal Revenue Service Intelligence Agency, was called by the Government for the purpose of introducing the \$20,000 check that was allegedly issued by Peter Fiumara. At the time of the Government's introduction of the check, Frank Moten's trial attorney, Ms. Nancy Rosner, raised the question to the court of whether or not a revenue subpoena had been used to procure the check. Judge Owen, in reply to Ms. Rosner's question, stated that he did not know (Tr. 5929-31) (A 403-405).

Peter Fiumara, after invoking his Fifth Amendment privilege outside the presence of the jury, and having immunity conferred on him, testified at trial and identified GX 42 as the \$20,000 check he issued which was made payable to Intersimone upon the instructions he received from Frank Moten (Tr. 6098-6107). Fiumara further testified that he had never met Intersimone and that Intersimone was not present at the time the check was issued.

Brown became a fugitive in April, 1973,¹⁹ and in 1975, he called Intersimone on March 30, 1975. Intersimone told him that had he called earlier, Intersimone would have had good news for him. Six days later, April 5, 1975, Brown voluntarily surrendered himself to federal agents.

**(C) Summary of John T. Brown's Testimony
Relating to Intersimone**

Sebastian Intersimone was identified by Brown as a source of heroin since they initially met in 1959, excepting a brief period in the early 1960's (1960-1964) when Brown was incarcerated in the Atlanta federal penitentiary. Intersimone had little day-to-day contact with Brown and his operations, having left New York City in 1970, and their contacts thereupon became social in nature. The relationship between Intersimone and Brown became almost a father-son relationship with Intersimone becoming the god-father of Brown's son, Jason Thad (Tr. 1927) (A 286). Significantly, however, while Brown allegedly discussed narcotics transactions with Intersimone during the period antedating the conspiracy (pre-198), there is testimony concerning only a *single* transaction involving Intersimone during the early 1970's which pertained to heroin *only*.²⁰ Brown's testimony of the single transaction date vacillated back and forth from 1970 to 1971 until he finally stated that he could not "truthfully" remember the date.

¹⁹ For a discussion as to the reasons Brown became a fugitive, see n. 7, *infra*.

²⁰ Brown testified that Intersimone "never" had anything to do with cocaine (Tr. 1924) (A 283).

(D) Other Government Evidence Relating to Intersimone

In addition to the testimony offered by unindicted co-conspirator, John T. Brown, the Government introduced a business card (GX 6C) on the back of which is written, allegedly by the wife of John T. Brown, directions to the Coachman's Diner in Ellenville, New York, and "12 miles to Accord—3 miles to my house." Government Exhibit 3P contains Intersimone's telephone number and the notation, Mr. Bee—"person to per," and lists a telephone number for Sam Granito in Boston. On cross-examination, Brown said that Intersimone had given him the telephone number of a friend in the Boston area who could help Brown's wife when she brought their son, Todd, to Boston for an operation (Tr. 1881-82) (A 252).

The Government also introduced telephone toll slips showing that Brown placed four calls from Florida to Intersimone's home on September 25, and November 4, 8, and 9th, 1974, but there was no testimony concerning the substance of these calls (GX 55A, 55B, and 104). The Government also offered Intersimone's line card, which the Government's expert testimony proved that Intersimone's phone in Accord, New York, was installed in August, 1967 (or more precisely, 8/67). The Government introduced in evidence Intersimone's toll slips for the period of January 28, 1973, to November 18, 1973, which show calls were placed from Intersimone's home to the following: Carol Cuffee's apartment (once in May and once in June); Moten's home in New Jersey (twice on July 24); and Brown's home in Orangeburg (on 1/31, 2/13, 3/24, 3/25, 9/4, 10/11, and 11/4). The Government did not offer evidence as to the substance of these conversations, and there was no proof that Brown was at the location called on the date called. In fact, the evidence indicated Brown was *not* at the above locations on the dates indicated.

Michael Parker, son-in-law to John T. Brown, testified at trial that Brown told him early in 1972 that he (Brown), *had* another source of heroin. Brown said, "he *used to get heroin* from Mr. B and . . . Mr. B had gotten in trouble . . ." (Tr. 3304-05). At this time Intersimone moved to strike that testimony as not in furtherance of the conspiracy, but was mere narrative, such motion being denied.

At the conclusion of the Government's case, Intersimone moved the court for a summary judgment of acquittal on the grounds that he was not a member of the overall conspiracy charged in the indictment; that multiple conspiracies were proven at trial; and the evidence was insufficient to warrant a conviction, which motion was denied.

Following the verdict of the jury, evidence was adduced that the jury was tainted by extrinsic matters in their hearing and deliberations of the case.

ARGUMENT

POINT ONE

The Prosecution Proof Suffered the Error of Variance From the Pleading, And in Denying Intersimone's Motions for Severance, His Right to a Fair Trial was Substantially Affected by the Mass Trial Format and by the Extraneous and Prejudicial Spillover Evidence.

1. Intersimone's Lack of Agreement

A conspiracy is an agreement *among* the conspirators. *United States v. Falcone*, 311 U.S. 205 (1940). A meeting of the minds is required. *Krulewitch v. United States*, 336 U.S. 440 (1949) (*Jackson, J., concurring*). "[U]nless at least two people commit [the act of agreeing], no

one does." Furthermore, the law of conspiracy *requires* agreement as to the "object" of the conspiracy, *Developments in the Law-Criminal Conspiracy*, 72 Harv. L. Rev. 929-33 (1959). This does not mean that the conspirators must be shown to have agreed on the details of their criminal enterprise, but it does mean that the "essential nature of the plan" must be shown. *Blumenthal v. United States*, 332 U.S. 539, 557 (1947). Proof of the plan is required because "the gist of the offense remains the *agreement*, and it is therefore essential to determine what kind of agreement or understanding existed as to *each* defendant." *United States v. Borelli*, 336 F.2d 384 (2nd Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). And, the importance of making this determination cannot be overstated. "[A]greement is the essential evil at which time the conspiracy is directed" and it "remains the essential element of the crime." *Ianelli v. United States*, 420 U.S. 770, 777, n. 10 (1975).

From the record in the instant case, we find no "mutual dependence and assistance" to have existed among Intersimone and the others on trial. *United States v. Tramunti*, 513 F.2d 1087 (2nd Cir. 1975), *cert. denied*, 423 U.S. 832 (1975). In fact, the chief Government witness, John T. Brown, testified during the trial that Intersimone "never" had any dealings in cocaine, a major part of the "single conspiracy" alleged by the Government (Tr. 1924) (A 283). Therefore, the aim and purpose of Intersimone in relation to the others were not "common" at all, *United States v. Agueci*, 310 F.2d 827 (2nd Cir. 1962), *cert. denied*, 372 U.S. 959 (1963), and *United States v. Bertolotti*, 529 F.2d 149 (2nd Cir. 1975), but were *parallel*. As the proof disclosed, the only common factor between the *single* alleged heroin transaction adduced to Intersimone and the activities of the others was the participation of the same Government witness, unindicted co-conspirator, John T. Brown. Moreover, the actual proof at trial showed that Intersimone

renounced his participation in any conspiracy (Tr. 1138-1142) (A 224-228). Most importantly, the proof disclosed *no* participation in cocaine dealings between Intersimone and other defendants who dealt exclusively in cocaine.

2. The Proof Disclosed Multiple Conspiracies

Throughout the entire trial, the Government utilized and continuously displayed to the jury, a conceptual organizational chart which allegedly portrayed the illegal conspiratorial enterprise charged in Count One of the indictment (A. 138). We have examined this chart, and find that it is quite obvious that Intersimone is in no way connected to the cocaine conspiracy, better referred to the "Miami Cocaine Connection," which runs *parallel* to him on the opposite side of the chart. Thus, it is readily apparent that instead of one "chain" of distribution as alleged by the Government in the indictment, there are *two* distinct and separate "chains" of distribution: The one appearing on the left side of the chart as the Heroin Conspiracy, and the one on the right side of the chart as the Cocaine Conspiracy.

The cocaine conspiracy which involved the members of the "Miami Cocaine Connection," Alvarez, Rodriguez, and Sureda, is the only conspiracy at trial which resembled the orthodox business operation with which this Court is very familiar: the loose-knit, vertical, chain, conspiracy. In the instant case, however, there was no evidence "linking the three conspiracies together in a single, overall chain." *United States v. Miley*, 513 F.2d 1191, 1206 (2nd Cir. 1975); *United States v. Butler*, 494 F.2d 1246 (10th Cir. 1974). Indeed, the only common factor linking the transactions between the three spheres was the presence of the same Government witness, undicted co-conspirator, John T. Brown. This type of nexus has never been found to be sufficient. *Kotteakos v. United*

States, 328 U.S. 750, 773-74 (1946). The description of the operation in *Miley, supra*, is perfectly apt in the instant case. The operations around Intersimone and Brown could hardly be attributed to any real organization, even a loose-knit one. *United States v. Miley, supra*, at 1207. There was no evidence to show that Intersimone and Brown "were conducting what could be seriously called a 'regular business on a steady basis.'" *Miley, supra*. This is especially true because of the single alleged transaction adduced to Intersimone over a period of seven and one-half years. Moreover, there is no evidence specifically "linking" the persons of the left chain of the Government's chart to those in the right chain.

Since this Court has, on several occasions, stated that it is error to try several conspiracies as though there was only one conspiracy, we think the instant case requires reversal. One such important case in point is *United States v. Bertolotti*, 529 F.2d 149, 154 (2nd Cir. 1975), in which this Court stated the following:

"When convictions have been obtained on the theory that all defendants were members of a single conspiracy, although the proof disclosed multiple conspiracies, the error of variance has been committed. *Berger v. United States*, 295 U.S. 78 (1935); *Kotteakos v. United States*, 328 U.S. 750 (1946)."

It is clear, therefore, that the Government has merely merged several conspiracies into one for the sake of convenience. *United States v. Butler, supra*, at 1256. And, because the proof at trial disclosed multiple conspiracies, there has been a material variance between the indictment and the proof. *Kotteakos v. United States*, 328 U.S. 750 (1945). It is understood, of course, that even if additional or multiple conspiracies are proven, and even if there is a variance between the indictment and the proof, as here, the rights of the defendant at trial

must have been affected in a substantial way and substantial prejudice must be shown. *United States v. Borelli*, 435 F.2d 500, 502 (2nd Cir. 1970), *cert. denied*, 401 U.S. 946 (1971); *United States v. Fantuzzi*, 463 F.2d 683 (2nd Cir. 1972); *United States v. Miley*, 513 F.2d 1191, 1207 (2nd Cir. 1975); *United States v. Bertolotti*, 529 F.2d 149 (2nd Cir. 1975); *United States v. Ricco*, Dkt. No. 76-1129, Slip Opinion 6157 (2nd Cir. 1977); *United States v. Lam*, Dkt. No. 75-1435, Slip Opinion 5725, 5736-38 (2nd Cir. 1977).

As this Court in *Bertolotti*, *supra*, at 156 citing *Blumenthal v. United States*, 332 U.S. 539, 559 (1947) said, "It may generally be conceded that the possibility of prejudice resulting from a variance increased with the number of defendants tried and the number of conspiracies proven." This Court there discusses the number of conspiracies and defendants involved in various cases before the Supreme Court and also before it in this Circuit. In *Bertolotti*, the indictment named twenty-nine persons (here thirty-three), with seventeen actually going to trial (here twenty-two). In *Miley*, *supra*, a five-day trial, this Court found no prejudice to a defendant, where there were at least two conspiracies with only five defendants. The *Bertolotti* trial took four weeks, and the trial in *United States v. Sperling*, 506 F.2d 1323 (2nd Cir. 1974), upon which the *Bertolotti* Court relied in its "warning" about mass trials such as this, also took only four weeks. The instant trial took in excess of *thirteen* weeks, over three times as long as *Bertolotti*. As this Court stated in *Bertolotti*, *supra*, at 157, "Under the guise of its single conspiracy theory, the Government subjected each of the seven appellants to *voluminous testimony relating to unconnected crimes in which he took no part*" (emphasis supplied). This is precisely Intersimone's position here. The relevant evidence proved that Intersimone was a minor figure in the Government's thirteen-week presentation who, as will be shown was severely prejudiced by the inundation of evidence about

other defendants with whom he had absolutely no connection and the mass trial format utilized by the Government in attempting to prove its "conspiracy theory."

3. Severance

Intersimone made a pre-trial motion for severance plus numerous motions throughout the trial for either a mistrial or severance, none of which was granted by the trial judge. These motions were made because it became readily apparent that the Government would inevitably end up attempting to prove, as it did, that Intersimone was not connected in the slightest degree with the other two conspiracies proven at trial. As discussed, *supra*, the evidence at trial did not prove a "single conspiracy," as that alleged by the Government but, rather, the evidence disclosed two distinct and unrelated conspiracies in which Intersimone took no *common* part.

Thus, the Government, over the objections of Intersimone, joined thirty-three defendants under Rule 8(b), *Federal Rules of Criminal Procedure*, in one, massive, all-inclusive conspiracy.

Professor Wright (Wright, *Federal Practice and Procedure*, Criminal Section 144 (1969) at 318-19), quoting the Rule, points out that joinder of offenses under Rule 8(b) *requires* a showing that the offenses were part of the "same act or transaction or . . . the same series of acts or transactions . . ." *Id.* at 812. Thus, the purpose of the Rule is to prevent the "cumulation of prejudice [from] charging several defendants with similar but unrelated offenses." *Cupo v. United States*, 359 F.2d 990, 992 (5th Cir. 1966). See *United States v. Granello*, 365 F.2d 990 (2nd Cir. 1966), *cert. denied*, 386 U.S. 1019, *rehearing denied*, 387 U.S. 949 (1967); 8 Moore, *Federal Practice*, Par. 8.06(2), at 8-34 through 8-35.

Furthermore, the denial of severance was all the more deleterious in this case, where the Government, pre-trial, severed, among others, the major heroin suppliers, John Capra, Steven DellaCava, and Leoluca Guarino and then post-trial, filed a *Nolle Prosequi* against the Capra Trio. These actions by the Government implicitly demonstrates its initial impropriety in improperly joining thirty-three defendants in such an unwieldy and unmanageable prosecutorial format.

Were the pre-conspiracy testimony introduced at trial not damaging enough, it was drawn into sharp relief by the fact that the Government's proof as to Intersimone's overall participation in the conspiracy proper was limited strictly to a *single* transaction occurring either in 1970, or 1971, leading ineluctably to the conclusion that the Government chose to utilize such "limited testimony" solely for the purpose of bolstering what was a very weak case by attempting to prejudice Intersimone with testimony that was improperly admissible as to all other defendants.

Thus, the thirty-three defendants initially indicted were, in fact, improperly joined in one proceeding. The denial of severance here has on more than one occasion earned the scorn of appellate courts, particularly in light of the precisely articulated severance requests previously resisted by the Government. *United States v. Miley*, 513 F.2d at 1209 (2nd Cir. 1975) (*Friendly, J.*); *United States v. Kelly*, 349 F.2d at 759 (2nd Cir. 1965), *cert. denied*, 384 U.S. 947 (1966); *United States v. Branker*, 394 F.2d at 889 (2nd Cir. 1968). See also, *United States v. Butler*, 494 F.2d 1246 (10th Cir. 1974); *United States v. Shuford*, 454 F.2d 772, 776 (4th Cir. 1971); *United States v. Gambrill*, 449 F.2d 148, 1162 (D.C. Cir. 1971); *United States v. Varelli*, 407 F.2d 735, 747-8 (7th Cir. 1969).

4. Mass Trial Format and Prejudicial Spillover

Proceeding in flagrant violation of this Court's warnings in *United States v. Sperling*, 506 F.2d 1323 (2nd Cir. 1974); *United States v. Miley*, 513 F.2d 1191 (2nd Cir. 1974); and, *United States v. Bertolotti*, 529 F.2d 149 (2nd Cir. 1975), the Government subjected Intersimone, twenty-one additional co-defendants, and the District Court to a circus-like spectacle.

This Court can well imagine the sight of twenty-two lawyers for the defendants and twenty-one defendants, plus three to four Government lawyers, all massed together in one courtroom, not to mention the thousands of pages of 3500 material and transcript minutes overflowing onto the floor from the jammed-together defense counsel tables. In addition, many of the defendants were standing up and sitting down during the examination of the Government's thirty-five witnesses,²¹ defendants, Intersimone and Bonilla, became intoxicated during the course of trial, with both displaying outbursts of emotion sufficient enough to warrant the excusing of the jury on two different occasions. In a sense, the scene depicted in the courtroom by the very size of the room and the very number of the defendants all strung together, helped to unfairly bolster the Government's case and to give it an unfair advantage: The "massive conspiracy" is "proven" by the massive number of defendants.

In *United States v. Sperling*, 506 F.2d 1323 (2nd Cir. 1974), although this Court stated that there were enough connections between two groups of drug dealers to justify a single trial, the Court set forth its views on a mass conspiracy trial such as the Government conducted in

²¹ Also present in the courtroom during trial were numerous DEA Agents and New York City Task Force Narcotics Detectives, some of whom testified for the Government and who also personally assisted the jurors throughout the trial.

the instant case. Thus, in *Sperling*, this Court stated at page 1340 the following:

"In view of the frequency with which the single conspiracy vs. multiple conspiracies claim is being raised on appeals before this court . . . we take this occasion to *caution* the government with respect to *future* prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. While it is obviously impractical and inefficient for the government to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictments against a dozen or so more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy *when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top*. Little time was saved by the government's having prosecuted the offenses here involved in one rather than two conspiracy trials. On the contrary, many serious problems were created at the trial level, including the inevitable debate about the single conspiracy charge, which can prove seriously detrimental to the government itself. We have already alluded to our problems at the appellate level, where we had to comb through a voluminous record to give adequate consideration to the claims of the eleven separate appellants." (Emphasis supplied).

In *United States v. Miley*, 315 F.2d 1191 (2nd Cir. 1974), this Court repeated *Sperling's* warning that the mass conspiracy format was "ill-advised," and invited reversals. *United States v. Miley, supra*, at 1195, 1207 n. 10, 1210. There, the convictions were not overturned only because the trial was short, the defendants were few,

and there was no testimony as to any particular defendant which differed substantially from that of others. *United States v. Miley, supra*, at 1209.

In *United States v. Bertolotti*, 529 F.2d 149 (2nd Cir. 1975), there was no need to repeat the *Sperling* warnings, but simply apply them. This Court reversed the convictions.

We think the time has come once again, as the instant trial glaringly demonstrates, for this Court to make good its promises in *United States v. Sperling, supra*. Accordingly, Intersimone's convictions should be reversed and the indictment dismissed.

POINT TWO

The Evidence Indicated Only a Single Transaction Which is Insufficient to Sustain the Charge.

John T. Brown, the only Government witness to testify against Intersimone, testified that during the period of the conspiracy (1968-1976), only a *single* transaction occurred between him and Intersimone. In this single transaction, Intersimone allegedly sold Brown three to seven kilograms of heroin in either the Fall of 1970, or 1971. This single transaction during the entire period of the conspiracy, over seven and one-half years, could hardly connect Intersimone within the ambit of the conspiracy charged by the Government.

In an attempt to show that Intersimone committed additional acts in "furtherance of the conspiracy," the Government introduced a money-washing scheme which allegedly occurred in April, 1972, at Intersimone's request. This scheme allegedly had as its participants, Frank Moten, co-defendant at trial, and Peter Fiumara, an associate of Moten's.

Peter Fiumara, after having been granted immunity by the Government, testified that in April, 1972, he issued a certified check in the amount of \$20,000 made payable to Sebastian Intersimone under the direction and assistance of Frank Moten (Tr. 6099-6107) (A 411-419).

A copy of this check (GX 42) was introduced into evidence at trial by a Special Agent of the *Internal Revenue Service* Intelligence Division, Phillip B. Kirshen.

Indeed, this money-washing scheme could not be termed under any circumstances, as an act in furtherance of the *narcotics* conspiracy. At the very best, the entire "gist" of the money-washing scheme if, indeed, it ever occurred, was an apparent act in furtherance of a conspiracy to defraud the United States in income taxes. Interestingly enough, Fiumara testified that Intersimone was not present during the money-washing transaction and that he had never met Intersimone. By the very fact that the \$20,000 check was introduced by a Special Agent of the IRS, possibly under a *revenue subpoena* which in itself is highly improper in a criminal proceeding, proves that the money-washing scheme had nothing to do whatsoever with the narcotics conspiracy.

In even the most exaggerated sense, Intersimone could not be considered a "major supplier" in the massive conspiracy charged in the indictment. We think he is entitled to the benefit of the single act line of cases, led by *United States v. Reina*, 242 F.2d 302, 306 (2nd Cir. 1956), *cert. denied*, 354 U.S. 913 (1957), the one most specifically in point being *United States v. Aviles*, 274 F.2d 179, 190 (2nd Cir. 1959), *cert. denied* as *Evola v. United States*, 362 U.S. 974 (1960). See also *United States v. DeNoia*, 451 F.2d 979 (2nd Cir. 1971). This was a large, multi-party conspiracy extending over a period of *seven* years. Intersimone's dealings were on *one* occasion only. Viewed in the entire context of the conspiracy, his act quantitatively is minuscule. "When

the Government throws out its big conspiracy net to catch the big fish in the criminal sea, it has to be aware that an occasional minnow may wiggle free." *United States v. Tramunti*, 513 F.2d 1087, 1112 (2nd Cir. 1975).

Therefore, a single transaction remains as evidence against Intersimone, a transaction of heroin which allegedly occurred in either the Fall of 1970, or 1971. "For a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the federal narcotics laws, there must be *independent evidence* tending to prove that the defendant in question had some knowledge of the broader conspiracy (in the instant case, both heroin and cocaine)." *United States v. DeNoia, supra*, at 981.

The single act charged against Intersimone can in no way connect him with the conspiracy charged in the indictment. Hence, the evidence indicated only a single transaction which is insufficient to sustain the charge.

POINT THREE

The Admission Into Evidence of Prior Similar Acts was Reversible Error.

The introduction of evidence relating to prior similar activities of an accused poses serious evidentiary problems, arising out of a fundamental demand for justice and fairness, *Lovely v. United States*, 169 F.2d 386 (4th Cir. 1948).

The general rule is that, on the prosecution for a particular crime, evidence which shows or tends to show that the accused has committed another crime wholly independent of, and unconnected with, that for which he is on trial, even though it is a similar crime, is irrelevant and inadmissible. *Michelson v. United States*, 355 U.S.

469 (1948). The inquiry into character is foreclosed to ensure that the defendant's trial will not be infected with undue prejudice. In *Michelson, supra*, the Supreme Court took judicial notice of the tremendous persuasive effect of character evidence. Since evidence relevant to prior similar activities of the accused may be of a highly probative value in proving elements of the crime charged, i.e., intent, guilty knowledge, the presentation of such evidence is judicially sanctioned in certain exceptional circumstances.

Federal Rule of Evidence 404 is the basic rule governing the admissibility of character evidence in criminal cases. *Weinstein's Evidence*, pgs. 404-10. The specific rule relating to evidence of other crimes, wrongs, or acts is covered by subdivision (b), and is basically a codification of previous federal practice. *Weinstein*, pgs. 404-41, 42. The Advisory Committee's Notes to subdivision (b) stress the crucial importance of weighing potential undue prejudice against the real probative value of the evidence.

Thus, when reviewing a district court's ruling on the admissibility of evidence under Rule 404 (b), the central question is whether the trial court abused its discretion in determining that the probative value of the evidence outweighed its potential prejudicial effect. *United States v. Czarnecki*, 552 F.2d 698 (6th Cir. 1977); *United States v. Riggins*, 539 F.2d 682 (9th Cir. 1976); *United States v. Cook*, 538 F.2d 1000 (3rd Cir. 1976). We respectfully submit that the trial judge abused his discretion in the instant case.

The language of Rule 404 is inclusive—evidence of prior similar activities is barred, but *may* be presented as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. The Report of the Senate Committee of the Judiciary,

93rd Congress, 2nd Session, No. 93-1277, October 18, 1974, 00. 24-25, stated that the word "may" was not designed, "... to confer any arbitrary discretion on the trial judge," but was used in order to enable the trial judge to *exclude* evidence of other crimes, wrongs, or acts for purposes other than to prove character, properly considering prejudice, confusion or waste of time. See, also *United States v. Harpey*, 239 F.2d 945 (C.A.D.C. 1956); *United States v. Stirone*, 262 F.2d 571 (3rd Cir. 1958); *reversed on other grounds*, 361 U.S. 212 (1960); *United States v. Sebo*, 101 F.2d 889 (7th Cir. 1939); *United States v. Bullard*, 395 F.2d 658 (5th Cir. 1968); *United States v. Wood*, 484 F.2d 127 (4th Cir. 1973); *United States v. Byrd*, 352 F.2d 570 (2nd Cir. 1970); *United States v. DeVore*, 368 F.2d 396 (9th Cir. 1966).

In a recent case, decided before the effective date of the Federal Rules of Evidence, the Sixth Circuit stated that prior similar activity evidence, "may not be admitted under any exception unless the matter for which the evidence is offered is 'in issue'" citing *United States v. Nemeth*, 430 F.2d 704 (6th Cir. 1970). And in a Second Circuit opinion of great prescience, decided ten years prior to the adoption of the *Federal Rules of Evidence*, the real issues underlying the admissibility of prior similar activities evidence were confronted. Focusing on the probative value of evidence, this Court in *United States v. Byrd*, 352 F.2d 570 (2nd Cir. 1965):

"Another factor to be considered is whether the Government was faced with a real necessity which required it to offer the evidence in its main case. The defense had not, either in its claims or the statement of facts which would seek to prove, 'sharpened' the issue of intent by asserting that the act charged was done innocently or by accident or mistake. Nor did the Government suffer from a lack of evidence or intent. There was therefore

no oppressing necessity that evidence of that prior occasion be offered on the Government's main case."

The *supra*, opinion supported the above statement by citing not only such eminent authorities as McCormick and Wharton, but also an earlier Second Circuit decision which held that if intent is an element of the crime charged, "the state may present prior similar activity evidence *in rebuttal, after the issue has been raised by defendant.*" *United States v. Ross*, 321 F.2d 261 (2nd Cir. 1963) (Emphasis supplied).

The twelve-year period spanned by the above decision was culminated by the adoption in 1975, of the *Federal Rules of Evidence*. The intent of Congress in adopting Rule 404 (b) was to codify the decisional law cited above, as stated in the Advisory Committee's Note to Rule 404 (b):

"The rule provides that the evidence may be admissible. *No mechanical solution is offered.* The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence, in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403 (a)" (Emphasis supplied).

And, in *United States v. Thompson*, 513 F.2d 577 (8th Cir. 1975), the Court stated, in referring to Rule 404 (b):

"Although the Federal Rules of Evidence are not effective until July 1, 1975, they are in the instances here cited not contrary to case law. Hence, we feel it appropriate to cite them as a primary source of evidentiary rules."

To the extent that Rule 404 was essentially a codification of existing decisional law, its practical effect was minimal. Court decisions under the "new" Rule have continued to emphasize the need for trial judges to balance prejudicial effect against probative value. See, e.g., *United States v. Leaphart*, 513 F.2d 747 (10th Cir. 1975); *United States v. Eatherton*, 519 F.2d 603 (1st Cir. 1975); *United States v. Calvert*, 523 F.2d 895 (8th Cir. 1975); *United States v. Bermudez*, 526 F.2d 89 (2nd Cir. 1975); *United States v. Wixom*, 529 F.2d 217 (8th Cir. 1976); *United States v. Bledsoe*, 531 F.2d 888 (8th Cir. 1976); *United States v. Dansker*, 537 F.2d 40 (3rd Cir. 1976); *United States v. Cook*, 538 F.2d 1000 (3rd Cir. 1976); *United States v. Foutz*, 540 F.2d 733 (4th Cir. 1976); *United States v. Goichman*, 547 F.2d 778 (3rd Cir. 1976); *United States v. Riggins*, 539 F.2d 682 (9th Cir. 1976); *United States v. Czarnecki*, 552 F.2d 698 (6th Cir. 1977).

In the instant case, where more than *three-quarters* of the direct examination testimony related wholly to prior similar activities of the appellant, the prejudice to appellant is truly overwhelming. It is conceded, however, that if prior similar activity evidence adduced at the trial was highly probative of critical trial issues, it would well be within the discretion of the trial judge to allow the presentation of such evidence. *United States v. Stirone*, 262 F.2d 571 (3rd Cir. 1958). But it is a flagrant abuse of discretion to allow the introduction of severely prejudicial evidence which has *minimal* probative value. *United States v. Cook*, 538 F.2d 1000 (3rd Cir. 1976); *United States v. Goichman*, 547 F.2d 778 (3rd Cir. 1976).

Intersimone is charged with distributing, and possession with intent to distribute heroin, specifically, in the Fall of 1971. The only substantial trial issue with respect to appellant is whether, in fact, the Fall 1971 transaction actually occurred, and if so, *when*. The

introduction of prior similar activity evidence was designed to establish the propensity of the accused to participate in activities of the type charged in the indictment. The thirty-eight pages of trial transcript produced by the direct examination of John T. Brown, wholly relating to prior similar activities of appellant does not support a *single consequential fact* relating to the Fall 1971 transaction. Furthermore, the issue of intent or lack of intent was never put in as an issue by Intersimone; rather, the entire thrust of the defense was that the 1970/1971 transaction never occurred, not that it occurred but was innocent, and although an element of the crime charged, it was not proper for the prosecution to present evidence directed toward this element of the crime. *United States v. Ross*, 321 F.2d 261 (2nd Cir. 1963).

Another consideration is the remoteness in time of the alleged prior similar activities. The conspiracy commencement date of January 1, 1968, contrasts sharply with the bulk of the prior similar activity evidence which covers the 1959-1964 period. In *United States v. Byrd*, 352 F.2d 570 (2nd Cir. 1970), this court stated that probative value is measured by the extent to which prior criminal activities are "closely related in time." See, also *United States v. Clemons*, 503 F.2d 486 (8th Cir. 1974) wherein it was stated that, "to be used for this purpose, the criminal conduct must involve an offense similar in kind and *reasonably close in time to the charge at trial*" (Emphasis supplied); *United States v. Ring*, 513 F.2d 1001, 1004 (6th Cir. 1975). The lapse of more than a decade between the *earliest* prior similar activity evidence and the Fall 1971 transaction further mitigates the probative value of such evidence; even the *last* alleged prior similar activity occurred six to seven years *prior* to the Fall 1970/1971 transaction.

POINT FOUR

The District Court Abused its Discretion in Denying Appellant's Motion for Summary Judgment of Acquittal.

1. Lack of Evidence to Convict

We think the District Court abused its discretion in not granting Intersimone's motion for summary judgment of acquittal, because "the reasonable mind of a juror could (not) draw such an inference from (the evidence) so that he might fairly conclude guilt beyond a reasonable doubt." See generally, *United States v. Taylor*, 464 F.2d 240 (2nd Cir. 1972). No reasonable juror could conclude that Intersimone was a member of the "single conspiracy" alleged in the indictment, if indeed there was a "single overall conspiracy." In this case, as in *United States v. Borelli*, 336 F.2d 376 (2nd Cir. 1964), *cert. denied sub. nom., Cinquegrano v. United States*, 379 U.S. 960 (1965), the question is of vital significance, "because, in addition to the question with respect to the admission of declarations that are often presented, the issue (bears) importantly on the problem of the statute of limitations." *United States v. Borelli*, *supra*, at 383. Leaving aside the telephone call from Brown to Intersimone on March 30, 1975,²² the last act of Intersimone is the heroin transaction in either the Fall of 1970 or 1971 and the payments made thereafter. The jury could well have a reasonable doubt as to whether these acts occurred within the statutory period in which case Intersimone should have been acquitted of both the conspiracy and the substantive counts.

²² The jury could readily conclude that there was a reasonable doubt that the statement attributed to Intersimone, a) was made; b) referred to narcotics; or, c) was an overt act, since it is a statement of what might have been made if Brown had called earlier.

When questioned on cross-examination, Brown was unable to remember the most important parts of the transaction, i.e., the date of the transaction; the amount he paid for the narcotics; and, the number of kilograms he received in the transaction.

Brown testified to a transaction between himself and Intersimone which, according to Brown, occurred either in 1970 or 1971. In fact, on cross-examination, Brown said that he "truthfully" could not remember which year the transaction occurred (Tr. 1870, 1882, 1883) (A 244, 252, 253).

However, on re-direct examination, Brown testified that he had no doubt the four-kilogram transaction occurred in the Fall of 1971 (Tr. 2896) (A 352). Furthermore, on re-cross-examination (Tr. 3087) (A 334), Brown testified that he had talked to the prosecutor about whether the transaction was in 1970 or 1971. Brown further testified that the Government prosecutor in the instant case, Daniel J. Beller, had told him it was important to remember, to be sure the date was 1970 or 1971 (Tr. 3088) (A 335). This prosecution instruction occurred *after* Brown had become confused as to the date of the transaction on cross-examination, and *before* the re-direct examination conducted by the Government. Noteworthy, is the fact that Brown could not seem to remember the vital parts of the alleged Intersimone heroin transaction, unless coached by the Government, but could, however, instantly recall insignificant events in detail which had occurred some *seventeen* years before his testimony in the instant case (Tr. 1878-79).

Brown's memory as to the amount of the transaction and the amount he paid for the transaction are equally uncertain. Even though Brown testified on cross-examination that the amount he received in the transaction was four kilograms (Tr. 1888) (A 258), this testimony

is totally inconsistent with his prior statements. The testimony of Brown on direct examination reveals that he did not know the total amount he paid Intersimone in the alleged transaction. He further testified that in order to pay Intersimone, it was necessary that he make numerous trips from New York City to Accord, New York, carrying with him on each trip, a certain amount of money on what could be called an "installment plan" (Tr. 1144-1147) (A 233). On re-cross-examination, however, Brown testified that at the time the alleged Intersimone transaction took place, Frank Moten, a co-defendant at trial, was holding around \$100,000 or better for him and that he (Brown) had thousands of dollars at his disposal in safety deposit boxes (Tr. 3058-59) (A 310-311).

The alleged 1970 or 1971 transaction with Intersimone was the *only* transaction that Brown seemed to have much hesitance in recalling the particular details.

Furthermore, there is nothing in the record that shows Intersimone was cooperating with Brown or had agreed to do so. There was no showing of active participation on his part, nor did the evidence tend to show concerted action for the accomplishment of a common purpose. The evidence, at most, shows Intersimone's association with Brown and a knowledge of his activities. It is, therefore, insufficient to establish that Intersimone was, indeed, a co-conspirator. Therefore, there is distinct danger that the jury was influenced to conclude that there was a conspiracy because Intersimone was introduced to Moten by Brown; the unrelated and totally irrelevant "money-washing" scheme; the claim that Brown called Intersimone once in 1975; and, most significantly, the highly prejudicial "prior similar acts," that might support an inference that Intersimone was in a conspiracy and who was possibly participating. *United States v. Mendez*, 496 F.2d 128 (5th Cir. 1974); 3 Wright, *Federal Practice and Procedure*: Criminal § 854.

In viewing the evidence in a light most favorable to the Government *Glasser v. United States*, 315 U.S. 60 (1942); *United States v. Martinez*, 486 F.2d 15 (5th Cir. 1973); *United States v. Leslie*, 542 F.2d 285 (5th Cir. 1976); *United States v. Edwards*, 549 F.2d 362 (5th Cir. 1977), together with all inferences which may reasonably be drawn from the facts, *Cartwright v. United States*, 335 F.2d 919 (10th Cir. 1964), we submit that the Government did not present sufficient evidence upon which a jury might reasonably base a finding that Inter-simone is guilty beyond a reasonable doubt. *United States v. Arroyave*, 477 F.2d 157 (5th Cir. 1973). Therefore, we conclude the trial judge erred by submitting the case to the jury.

Another important aspect of the elements of proof was contained in the charge given to the jury (Tr. 8990-8993) (A 480-483). The court instructed that there need be no sample placed before the jury nor need there be any testimony by a qualified chemist as to what a substance is, so long as the evidence furnished to the jury gives a reasonable ground for inferring material in question was the narcotic drug charged. The jury was told that it may consider testimony that *someone* had personally tested samples from the powder and that the transactions were handled in a secret manner. Among the other elements that the court instructed the jury was that there be a lack of complaints on the part of the purchasers. In the instant case, there was no positive testimony that there had *not* been complaints, and it appears that the inference of the subject must be drawn from an inference that there were no complaints. Coupled with Brown's earlier inconsistent testimony that he had simply "passed" the heroin on without doing anything with it, it appears that he had no opportunity to discover whether any substance he had was, in fact, heroin or not. It should be remembered that there was an alleged transaction in 1969 where Brown had a quantity of Epsom

Salts in his possession for a period of *days* which he *believed* was heroin, and which was not determined to be otherwise for some period of time. It is without question that an individual cannot be convicted of a narcotics transaction if he passes Epsom Salts to another.

The Government must prove all the elements of a crime. It must establish that a transaction *did* take place, that the transaction included a substance which is proscribed by law, and that there was an intent to violate the law. In view of the evidence offered in this case, we feel that summary of judgment of acquittal was required.

United States v. Taylor, 464 F.2d 240 (2nd Cir. 1972) sets out the general principles for determining whether to grant a directed verdict of acquittal. Adopting the formulation of Judge Prettyman in *Curley v. United States*, 160 F.2d 229 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947), the court stated:

"The functions of the jury include the determination of the credibility of the witness, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice, or sympathy. The critical point in the boundary is the existence of non-existence of reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration."

In examining the elements of the Government's case, it becomes clear that Brown's recollection of the heroin

transaction is muddled and confused. Thus, rather than tending to eliminate the existence of a reasonable doubt, the Government's other evidence reinforces that doubt.

This is not a typical insufficiency of evidence case where the Government is attempting to prove that the defendant possessed the requisite intent and/or knowledge by reasonable inferences from circumstantial facts. *United States v. DeGarces*, 518 F.2d 1156 (2nd Cir. 1975); *United States v. Taylor*, 464 F.2d 240 (2nd Cir. 1972); *United States v. McIllo*, 275 F. Supp. 314 (E.D. N.Y. 1967).

If it cannot be reasonably concluded that an act took place within the time span required by the Statute of Limitations, a conviction cannot be upheld just as if any other element of a crime could not be found beyond a reasonable doubt. *Grunewald v. United States*, 353 U.S. 391 (1957); *United States v. Borelli*, 336 F.2d 376, 715 (2nd Cir. 1964), *cert. denied*, 379 U.S. 960 (1965); Title 18, U.S.C., § 3282.

This Court has recognized the problem raised by conflicting testimony of the same witness where one version exculpates and the other convicts in *United States v. Zanfardino*, 496 F.2d 887 (2nd Cir. 1974), *cert. denied*, 419 U.S. 830 (1974). The contradiction and confusion in the instant case is much greater and more persuasive. Brown contradicts himself about the date, not once as did the witness in *Zanfardino*, but numerous times. As previously set forth, other aspects of Brown's testimony concerning the transaction are also confused and contradictory.

Brown testified at one point that he related the deal with Intersimone to the death of his son in 1972, since it was paid off by then. Despite a superficial similarity,

the testimony by Martinez in *Zanfardino* concerning when she first purchased heroin is quite different than the testimony here. The independent, extrinsic fact in *Zanfardino*, if believed by the jury, could reasonably be found by them to eliminate the contradiction. The fact that Brown's son died in 1972, and that he remembered the debt being repaid by then does not eliminate either alternative, 1970 or 1971. It remained impossible to conclude without a reasonable doubt that the deal took place either in 1970 or 1971. This is further supported by the fact that the jury, after retiring for deliberation, returned to court and asked for additional instructions on reasonable doubt (Tr. 9268-70) (A 483-484).

Since it is impossible for a jury to conclude 1970, which would have required automatic acquittal in lieu of the Statute of Limitations, or 1971, without a reasonable doubt, there can be no finding absent a reasonable doubt. Furthermore, the record clearly shows that the minds of the jury were sorely over-taxed because of the prejudicial spillover from evidence of the conspiracy count to the substantive count which we think required the court to grant a summary judgment of acquittal.

This fact is clearly borne out in letters written post-trial by the Forelady of the Jury, Ms. Isabelle Blau (A 129-137):

"The overlapping of information, superimposing, criss-crossing of layers of facts juxtaposed in normal and legal language, led to confusion."

POINT FIVE**It was an Abuse of Discretion for the Trial Judge to Leave the issue of Brown's Credibility to the Jury Without the aid of Expert Psychiatric Examination.**

The court denied motions by defendants for a psychiatric evaluation of the key Government witness, John T. Brown, which should have been treated as motions to suppress the testimony of Brown at trial. The defense was entitled to discover certain information about Brown that could have been presented to the jury. Brown was not made available to the defense, and the Government did not undertake to have a psychiatric evaluation made of him.

There is, of course, a Constitutional right to confront one's accusers, but this right is dissipated when the defense is not permitted to adequately rebut the testimony of the accuser, or witness, through proof of his character and his mental capacity. The defense can investigate, but investigators can only find things that are already a matter of record. In this case, the fact that the prior record of Brown had been destroyed a few days before trial, should have spurred the trial judge to reconsider his denial of the motion for psychiatric evaluation of Brown.²³ Assuming, but not conceding, that there is no misconduct ascribed to the Government in the destruction

²³ Intersimone's trial attorney, David V. Keegan, attempted to properly subpoena Brown's criminal case file in a previous case (Criminal No. 552-60), together with the court files of the case (United States District Court, Washington, D. C.). After making repeated requests for the subpoenaed material during the course of the trial, Keegan was advised by the Government several weeks after the subpoena had been initially issued, that the criminal file of Brown had been "routinely" destroyed (A 150-174).

of the records, it still remains a fact that it was the Government's actions which made these records unavailable to the defense.

As part of the 3500 material on Brown, the Government turned over Exhibit 3505W for identification. Upon reading this document, a two-page, handwritten, letter made by Brown, a psychiatrist, Dr. Harvey Roy Greenberg, was retained to make an analysis of the letter for the purposes of determining whether it would be of benefit to the defense.

Dr. Greenberg prepared a letter which was submitted to the trial judge for the purpose of obtaining authorization for further funds for CJA counsel to impeach by extrinsic evidence the testimony of Brown (Tr. 4009) (A 378). The trial judge took the matter under advisement (Tr. 4010) (A 379), with the Government opposing. Ultimately, the trial judge declined to authorize the funds, but also ruled, in essence, that the court would not permit the evidence even if it was fully developed (Tr. 4050-4054) (A 380-384). The letter was marked Court's Exhibit 6.

Relying on this anticipatory ruling, no counsel proceeded to call psychiatric witnesses as to the credibility of the key Government witness, unindicted co-conspirator, John T. Brown.

The Supreme Court has recognized that where the Government's case in a criminal prosecution may stand or fall on the jury's belief or disbelief of one witness, as was the case here, that witness' credibility is subject to very close scrutiny. *Gordon v. United States*, 344 U.S. 414 (1953).

In the instant case, the record clearly shows that Brown was an admitted perjurer on not just one occasion. The record further shows Brown's prolonged period

of heroin addiction; his lengthy period of "almost daily" cocaine use, possibly even during trial at the time of his testimony; his many felony arrests and convictions beginning in 1944, and continuing for almost thirty years; his extensive dealings in narcotics for almost twenty-five years; his constant possession of weapons, including silencers; his admission that he often saw things move and heard voices while under the influence of cocaine; his shooting through a door because he constantly believed that someone was trying to kill him; his pistol-whipping a car salesman for insulting one of his many female companions; his flushing three kilograms of cocaine down the toilet because he believed they had been poisoned; and his belief that his own son-in-law, Michael Parker, was a hired killer.

There is no doubt of the court's authority to order a mental examination of a prosecution witness, *Carrado v. United States*, 210 F.2d 712 (D.C. Cir. 1954), and this authority becomes a duty whenever there is a reasonable doubt as to the competence or the credibility of the witness. *State v. Butler*, 27 N.J. 560, 143 A.2d 530 (1958); *United States v. Butler*, 481 F.2d 531 (D.C. Cir. 1973); *United States v. Benn*, 476 F.2d 1127, 1130 (D.C. Cir. 1973).

More than a quarter century ago, Wigmore called for the routine psychiatric examination of prosecution witnesses where, by reason of dependency on the prosecution or the nature of the charge, the claims are inherently suspect, 3 Wigmore, *Evidence* § 924(a) (3d ed. 1940). Scholarly and judicial authorities are clearly in accord. See Conrall, *Mental Examination of Witnesses*, 11 Syracuse L. Rev. 149 (1960); Weihofen, *Testimonial Competence and Credibility*, 34 Geo. Wash. L. Rev. 53, 75 (1965); Slovenko, *Witnesses, Psychiatry, and the Credibility of Testimony*, 19 U. of Fla. L. Rev. 330 (1958); Comment, 59 Yale L. J. 1324 (1950). While no one claims that a defendant has a right in every case to

have the witness against him examined, there is plainly such a right where some evidence of mental abnormality exists and the charge is a very serious one, *State v. Butler, supra*; *Taborsky v. State*, 116 A. 2d 443 (Conn. 1955), or the witness is a heavy part of the prosecution's case. *United States v. Butler, supra*; Comment, 59 Yale L. J. 1324 (1954).

The evidence brought out at trial relating to Brown's character was not only overwhelming proof of psychological abnormality, if not insanity, it was also incontrovertible proof of prolonged narcotics use. Brown readily admitted that in addition to other drugs, he snorted cocaine "on almost a daily basis" beginning in the 1950's. Citing medical sources, the District of Columbia Circuit, in *Hansford v. United States*, 365 F.2d 920, 922 (D.C. Cir. 1966), recently observed that:

"Current medical knowledge indicates that use of narcotics often produces a psychological and physiological reaction known as acute brain syndrome, which is a 'basic mental condition characteristic of diffuse impairment of brain tissue function.' The characteristic symptoms of the syndrome are impairment of orientation; impairment of memory; impairment of all intellectual functions including comprehension, calculation, knowledge and learning, impairment of judgment; and lability and shallowness of affect."

As to cocaine users in particular, it has been noted that:

Prolonged and heavy cocaine use can produce severe psychological and physiological effects. One frequent psychological result is hallucinations. In some cases, prolonged use causes paranoid delusions. Some commentators claim that in these states of hyperexcitement and paranoia, the cocaine user is extremely dangerous and potentially violent. McLaughlin, *Cocaine: The History and*

Regulation of a Dangerous Drug, 58 Cornell L.Q. 537, 551 (1973).

Still, as the court noted in *Hansford, supra*, 365 F.2d at 923:

"The effects of narcotic use will vary depending on the amount of drugs taken, the degree of tolerance developed by the individual, and the idiosyncratic reaction of the person to the drugs. For this very reason, only by a hearing can it be determined whether any particular [person] is incompetent because of his use of drugs."

In the instant case, the defense was denied even an opportunity to call a hearing, and denied access or inquiry into the relationship of Brown's drug usage to his other mental disorders. In refusing to have Brown undergo an in-depth psychiatric examination, the court not only denied the defense access to evidence relevant to the jury's assessment of credibility, it neglected its solemn duty to determine the testimonial competence of witnesses. *United States v. Crosby*, 462 F.2d 1201 (D.C. Cir. 1972). Not only was Brown incontrovertibly proved to be a continuous user of dangerous narcotic drugs, he was a self-admitted, persistent perjurer who had never been and did not expect to be prosecuted for his perjury. There was, therefore, no basis whatsoever for believing that Brown was a competent witness. He utterly and totally lacked "a sense of moral responsibility . . . to speak the truth", which is a requisite of testimonial competence. 2 Wigmore, Evidence § 495 (3d ed. 1940).

In denying the defense an opportunity to examine Brown's evidence, the court effectively suppressed evidence and made a fair trial impossible. Cf. *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Giles v. Maryland*, 386 U.S. 66, 69 (concurring opinion of Mr. Justice Fortas) (1967).

The court made its determination as to non-admissibility of such requested expert testimony based on scanty evidence and on what was apparently more than a marginal dislike of some of the theories involved in the psychiatric analysis. However, that is not a proper exercise of discretion. In fact, it is the mechanistic approach to new questions which is discouraged by this Court in *United States v. Schwartz*, 500 F.2d 1350, 1352 (2nd Cir. 1974); *United States v. Brown*, 470 F.2d 285 (2nd Cir. 1972).

In the instant case, defense sought to offer a highly qualified, concededly expert psychiatrist to examine and possibly testify concerning Brown's competence and credibility. The adequacy of the date upon which the opinion was based was neither disputed nor disputable. The sole reason for excluding the doctor's examination and possible testimony was the unfounded assertion that it would be of no use to the jury.

The admissibility of medical opinion relating to testimonial competence or credibility has been clear for a quarter century. *United States v. Hiss*, 88 F. Supp. 559 (SDNY 1949), *affd.* 185 F.2d 822 (2nd Cir. 1950), *cert. denied*, 340 U.S. 948 (1951); *Taborsky v. State*, 95 A.2d 59 (Conn. 1953); *United States v. Partin*, 493 F.2d 750 (5th Cir. 1974); McCormick, *Evidence* § 45, at 95 (2d ed. 1970). Indeed, exclusion of evidence similar to that sought to be offered in the district court was held reversible error more than a half century ago. *Ellarson v. Ellarson*, 198 App. Div. 103, 190, N.Y.S. 6 (1921); *State v. Pryor*, 74 Wash. 121, 132 P. 874 (1913).

The literature of psychiatry makes clear that a jury is particularly needful of medical guidance in assessing the credibility of such a questionable witness as Brown. As if writing about Brown, Henry Weihofen said of psychopathic personality (sociopathy):

It can have a material effect on credibility. Although capacity to observe and recollect is apparently unimpaired, the sense of moral responsibility to narrate truthfully may be affected. This may render the witness careless with the truth, impulsive, and undependable. Because he is so utterly devoid of any sense of guilt, he feels justified in telling all sorts of lies to escape the consequences of his acts.

The sociopath may harbor unconscious hostilities that lead to false accusations of biased testimony. He may crave the publicity that his accusations give him or, driven by unconscious motives, may indulge in repetitious lying which is wholly irrational and without any discernable end. He may appear normal, mild-mannered, and intelligent. His lies, indeed, are often told with more conviction than normal persons show. Even when his lying is exposed, he is able to make quick adjustments and thoroughly mislead the layman. Even the psychiatric expert has the greatest difficulty in recognizing the existence of the condition or assessing the person's credibility." Weihofen, *Testimonial Competence and Credibility*, 34 Geo. Wash. L. Rev. 53, 86 (1965).

Accord, Davidson, Testimonial Capacity, 39 B.U.L. Rev. 172, 179 (1959); 1 American Handbook of Psychiatry 581-3 (Arieti, ed. 1959); Redlich and Freedman, Theory and Practice of Psychiatry 392 (1966).

The jury may, of course, disregard an expert's testimony, or it may accept the testimony but believe the witness anyway. It is simply outrageous, however, to hold that the jury, or at least the court, may not be given an opportunity to *hear* the expert, and consequently that the Government may convict defendants of narcotics violations and sentence them up to life on the testimony

of a psychopath while denying the defense a right to have a jury hear its medical evidence. By excluding the evidence in the denial of an opportunity to have Brown examined, the court virtually directed a verdict of guilty. Conferring upon the trial judge the unfettered "discretion" to reject the defense the opportunity to present such evidence is tantamount to repealing the right to trial by jury.

POINT SIX

Statements and Actions Made by the Prosecutor Amounted to Flagrant Prosecutorial Misconduct Which Denied Appellant to a Fair Trial.

The issue of prosecutorial misconduct is no stranger to this Court. *United States v. Keogh*, 391 F.2d 138, 146-147 (2nd Cir. 1968); *United States v. Miller*, 411 F.2d 825, 830-831 (2nd Cir. 1969); *United States v. Polisi*, 416 F.2d 573, 577-579 (2nd Cir. 1969); *United States v. DeSapio*, 435 F.2d 272, 286-87 (2nd Cir. 1970). More recently, this Court addressed the issue of prosecutorial misbehavior by citing the trilogy of *United States v. Bivona*, 487 F.2d 443 (2nd Cir. 1973); *United States v. White*, 486 F.2d 204 (2nd Cir. 1973); *United States v. Drummond*, 481 F.2d 62 (2nd Cir. 1973), in *United States v. Burse*, 531 F.2d 1151 (2nd Cir. 1976).

The words of the prosecutor in the instant case (Tr. 9238) (A 486) clearly reveal the attitude displayed by the Government throughout the entire prosecution of the case:

MR. BELLER: I am delighted, your Honor, to let all the prejudicial evidence . . . go to the jury.

It is well settled that this Court has supervisory powers over the administration of justice. *McNabb v. United States*, 318 U.S. 332, 240 (1942). And, it is the

duty of the Judges of this Court to "(establish) and (Maintain) civilized standards of procedure and evidence." *McNabb, supra*. This power extends, at least, to Government attorneys and enforcement officers acting within this Circuit. *Smith v. Katzenbach*, 351 F.2d 810, 816 (D.C. Cir. 1965). The attorneys' and enforcement officers' conduct need not be so unfair or imprudent as to offend "due process" before exercise of this supervisory is appropriate. *McNabb, supra*, 318 U.S. at 340. Instead, the supervisory power can be utilized whenever the administration of justice has been tainted. *Communist Party of the United States v. Subversive Activities Control Board*, 351 U.S. 115, 124 (1955).

In *United States v. Banks*, 383 F. Supp. 389 (D.S.D. 1974), *Government's appeal dismissed as United States v. Means*, 513 F.2d 1329 (8th Cir. 1975), the court stated 397:

"It is this court's feeling that when the prosecutor acts in bad faith in complying with the orders and inquiries of the court the administration of justice is tainted and the court should, or at least has a right to, formulate a remedy through the use of its supervisory powers. * * * The remedy should be directly related to the seriousness of the misconduct, *i.e.*, serious misconduct warrants a more drastic remedy than minor misconduct. It is our opinion that the misconduct in this trial is serious and when weighed with other factors warrants reversal of the conviction and dismissal of the indictment."

In view of the standard utilized by this Circuit in evaluating whether or not prosecutorial misconduct has occurred, and in view of the opinion in *United States v. Banks, supra*, we think the instant case warrants reversal because of the following pertinent factors of prosecutorial misconduct:

A. Rejection of this Court's Warning in Sperling

By the unwieldy joining of thirty-three defendants in one indictment who were alleged to have participated in a "single conspiracy," and later forcing twenty-two of these defendants to a mass trial, the Government *flagrantly* rejected this Court's stern warning in *United States v. Sperling*, 506 F.2d 1323 (2nd Cir. 1974) which misconduct denied appellant a fair trial.

B. The Indictment of Defendant Albert Lee Jones Was Done Solely to Aid the Government

Defendant Albert Lee Jones, a/k/a "Al From Norfolk," has proved to be an aid to the Government as an invaluable tool in securing convictions. Proof to this may be found in the statement he gave on November 12, 1971, to officers of the New York Joint Task Force, Bureau of Narcotics and Dangerous Drugs. This statement was made after his arrest in a narcotics case in which he implicated the key Government witness in the instant trial, John "Jack" Brown (A 126-128). The case against Jones ultimately went to trial with Jones as the principle prosecution witness. Subsequently, Jones pleaded guilty and, for his testimony, was awarded probation.

Less than five years later, Albert Lee Jones returned for another day in court, this time in the instant case. Again, Jones is indicted for his dealings in narcotics (conspiracy and a substantive count). And, again, Jones made another confession just minutes before his arraignment which was predictably used at trial by the Government, although he did not testify for the Government (Tr. 5704-5421) (A 385-402). Interestingly, Jones gave his statement in the instant case to the prosecutor at trial, Daniel J. Beller (Tr. 3021-3030) (A 368-377). The end results in the instant case were the same as before: Jones, after being convicted, thus making him a narcotics offender, was granted probation.

We think the actions of the Government in this instance constitute prosecutorial misconduct which calls for reversal.

C. Indictment and Pre-Trial Severance of Capra, DellaCava, and Guarino

Capra, DellaCava, and Guarino (Capra Trio) were indicted April 15, 1973, along with the Key government witness in the instant case, John T. Brown, and others, for conspiring to violate the Federal Narcotics Laws with additional substantive counts (73 CR 331). Shortly after the indictment was returned, Brown became a fugitive, with the Capra Trio being ultimately arrested, tried, and convicted on all counts. During the course of the Capra Trio Trial, certain wiretap evidence (Capra Tapes) was introduced by the Government which this Court ruled were the fruits of an illegal wire tap.

The Government ultimately entered a *nolle prosequi* as to Count One against the Capra Trio, and in 1974, and dismissed the entire indictment against John T. Brown.

Two years later, the Capra Trio is indicted in the instant case, without Brown this time, for again conspiring with others to violate the Federal Narcotics Laws. However, the Capra Trio were *severed* pre-trial and did not appear.

On December 28, 1976, one month post-trial, the Government filed a *nolle prosequi* for the Capra Trio. Among the reasons asserted for the discontinuance of the instant prosecution against Capra, DellaCava, and Guarino, the Government stated:

" . . . Certain wiretap evidence against the co-defendant(s) . . . who remain to be tried is inadmissible against the defendants CAPRA, GUAR-

INO, and DELLACAVA, and would be prejudicial if admitted in a joint trial even with limiting instructions. Consequently, severance and a third trial may be required to permit the Government to introduce this evidence against the co-defendants . . ."

United States v. Capra, Dkt. No. 76 Cr. 324 (S.D.N.Y. 12-28-76 (*Nolle Prosequi*)).

We think that the Government knew at the time it indicted the Capra Trio the Government had full knowledge that the trio would require a pre-trial severance.

Therefore, the indictment of the Capra Trio in the instant case, with the Government's anticipation that the Trio would be severed pre-trial, constituted nothing more than a carefully calculated plan which ultimately allowed the Government to utilize and introduce prejudicial evidence against all twenty-two defendants at trial that it would not have been allowed to present had not the Capra Trio been severed. This prejudicial evidence included, but was not limited to, the following:

1. The Capra Tapes, fruits of illegal wiretap;
2. Brown's testimony in meeting Leoluca Guarino while both were incarcerated in the Atlanta Federal Penitentiary;
3. Certain statements of Brown concerning the "Pleasant Avenue Bunch" members, especially his knowledge of Jinx;
4. The \$13,999 cash and the "sealing" paraphernalia found in De'llaCava's car at the time of his arrest in *United States v. Capra* (S.D.N.Y. 73 Cr. 331).

Therefore, the Government introduced the Capra Trio evidence as outlined above, during the instant trial with the certain knowledge that not *one* of the twenty-two

defendants at trial had standing to object to such evidence.

The Supreme Court in *Alderman v. United States*, 394 U.S. 165 (1969) (*White, J.*) held (1) expressing the view of six members of the Court, that co-conspirators and co-defendants whose rights were not violated by illegal eavesdropping have no standing to object to the admission of evidence obtained as a fruit of such eavesdropping; (2) expressing the view of five members of the Court, that the owner of the premises has standing to object to the admission of evidence obtained as a fruit of illegal eavesdropping on such premise even if he was not present and did not participate in the conversations which were overheard; and, (3) expressing the view of five members of the Court, that unless the Government prefers to dismiss its case rather than to disclose information obtained through illegal eavesdropping, persons who have standing to object to the admission of evidence obtained as a fruit of such eavesdropping are entitled to examine the Government's eavesdropping records, so as to be able to determine to what extent the eavesdropping may have contributed to the prosecution's case.

D. Name of Willie Womack, Unindicted Co-Conspirator Prejudicially Placed on Government's Conspiracy Chart Displayed at Trial

The redirect examination of the Government's key witness, John T. Brown, "dramatically" concluded with a series of questions apparently calculated to convince the jury that Brown surrendered to the FBI because he feared for his life. The record reveals, however, that the examination by the Government consisted only of "shocking and inflammatory" matters which necessarily had the impact of unfairly connecting Intersimone with several murders having occurred prior to the inception of the charged conspiracy and unrelated to the conspiracy.

Brown testified that several persons, including Willie Womack, were involved in narcotics and, at the time of Brown's testimony, they had all been murdered (Tr. 2946-2951) (A. 357-362). Timely objection was interposed by counsel, as was a motion for mistrial (Tr. 2947) (A 358). The court overruled the objection and denied the motion.

The Government placed the name, "Willie Womack", on its conceptual organizational chart which was in full view of the jurors at all times (A 138). Interestingly, Womack is the *only* unindicted co-conspirator listed on the entire chart who is, in contrast to others, insignificant. Consequently, by placing Womack's name on the chart and introducing evidence tending to show that he was murdered, the inference made by the Government on the jury left the prejudicial innuendo that Womack was murdered *as a result* of his alleged participation in the conspiracy of the instant case.

At no time did the Government seek to establish that any of the murdered narcotics peddlers met their demise as a result of their trafficking or for any other reason which may have been probed by defense counsel on cross-examination of Brown. None of the murders were even remotely connected to Intersimone.

No defendant ought to have a jury which is considering his guilt or innocence hear evidence of this sort absent proof connecting him with the subject matter discussed. *Bertolotti, supra*, at 158.

Compounding the prejudice was the Government's reiteration of the murders of the narcotics peddlers during summations to the jury. During his rebuttal argument, the Assistant United States Attorney, in commenting on Brown's motivation to become a Government witness, stated that Brown "surrendered himself because there was a contract on his life," and likened Brown's situation

to that of the seven narcotics peddlers, all of whom were murdered. Such inflammatory inference by the use of Willie Womack's name, testimony, and argument to the jury incalculably prejudiced Intersimone's right to a trial free from passion and prejudice, which resulted from prosecutorial misconduct.

E. Improper Use of Revenue Subpoena

In pre-trial discovery, Intersimone moved pursuant to Rule 16 (a) (1) (c), *Federal Rules of Criminal Procedure*, thereby seeking the Government to disclose certain material, including "all checks . . ." (A 70). Despite the fact that the Government had pre-trial possession of a check it intended to use as evidence against defendants, it waited until through trial to "spring" this evidence, to the complete surprise of the defense, by introducing the check as Government's Exhibit No. 42. Significant is the fact that Government's Exhibit No. 42 was a result of an Internal Revenue Service Intelligence Division investigation which was totally independent, and completely irrelevant to the instant case. Equally significant is the fact that Government Exhibit No. 42 was obtained by *Revenue Subpoena*.

Thus, by the Government waiting until well into the trial to introduce Government's Exhibit 42, the \$20,000 check, after it had been requested in pre-trial discovery, the Government plainly disregarded its solemn obligation to make available to the defense evidentiary material in its possession which is disclosable under due process safeguards of *Brady v. Maryland*, 373 U.S. 83 (1963), or the requirements of Rule 16, *Federal Rules of Criminal Procedure*. See: *United States v. Miranda*, 526 F.2d 1319 (2nd Cir. 1976).

F. Government Utilizes Instant Trial as "Showcase Narcotics Case" Before U.S. House of Representatives

On September 21, 22, 23, 28, 29, and 30, 1976, the U.S. Deputy Attorney General, along with several DEA and FBI agents, appeared before the Select Committee on Narcotics Abuse and Control, House of Representatives, 94th Congress, 2nd Session.

During the Oversight Hearings before this Select Committee, testimony was offered by DEA and FBI agents specifically relating to the indictment and trial in the instant case. Thus, the instant case was lauded as a "showcase of achievement" by the DEA before the committee with the underlying purpose of securing additional appropriation. The massive number of defendants, who allegedly had been caught in the DEA drug-net, were recited by name, one by one into the Committee record, thereby purportedly bolstering the effectiveness of the DEA.

One such "opportunity" occurred at the very same time hearings were being conducted in the Senate on Narcotic Abuse. On September 20, 1976, a juror, William T. Keno, was discharged in the instant case for possible jury tampering, who was also arrested the same day by Federal agents on related charges. Despite the fact that information disclosed a strong possibility existed that another juror, or jurors were also involved, the Government strongly opposed defense motions for mistrial, and further conducted hearings regarding the jury tampering under a cloak of secrecy with pertinent minutes of the *in camera* hearings being sealed.²⁴

²⁴ On June 6, 1977 Intersimone moved the District Court to Unseal Minutes for Appellate Purposes. At the time of the writing, no ruling by the Court has been made.

G. Statements Made by the Prosecutor in Summation

In the rebuttal summation by the Government, it unfairly attacked defense counsel for what was not done on cross-examination. This particularly came out in regard to Government witness Ann Reynolds when the Government accused defense counsel by implication that the defense was not doing its job in "going after" the witness (Tr. 8633) (A 429).²⁵

It would have been the absolute height of foolishness for Intersimone's defense to attack every single witness who did not even mention him. And yet, all of their testimony, with limited exceptions, can, because of the "conspiracy theory," be utilized and considered by the jury against Intersimone. The trial judge did not cure this error with instruction (Tr. 8646-47) (A 442-3).

Later, the Government, over heated objections, repeatedly and constantly attacked *all* counsel and lectured the jury on what job of defense counsel is and that its job is to "get their man off" (Tr. 8658, 8660) (A 454, 456). The Government accused counsel of coming into Court and saying "*whatever*" is necessary to get their clients off (Tr. 8679) (A 465). That amounted to an attack on all counsel, regardless of how the individual defense had been conducted, in order to inflame the jurors against counsel and defendants. Government counsel went outside the record (Tr. 8659) (A 455) far exceeding normal summation rhetoric to state that never had there been an attorney in history who did not do

²⁵ In essence, this amounted to an indirect but clear attack on the defendant's right not to testify and his right to remain silent during the trial. This is improper. *United States ex rel. D'Ambrosio v. Fay*, 349 F.2d 957, 960-61 (2nd Cir. 1965), *cert. denied*, 382 U.S. 921.

such things. Government counsel further introduced in rebuttal summation pre-indictment transactions involving Intersimone in a "bad man theory" which was objected to and motion for mistrial made by counsel with no ruling made by the trial judge (Tr. 8775).

Government counsel not only brought its own credibility into play on a number of occasions, but it also brought the court's credibility unfairly into the juror's deliberation process, which was objected to (Tr. 8894, 8897) (A 466, 469).

We think the Government's responses were improper, inappropriate, and severely prejudicial to Intersimone, particularly since the evidence against him was so limited and so slim.

Furthermore, such instances of prosecutorial misconduct as the ones noted above fatally prejudiced the jury against Intersimone's case and were in flagrant violation of the warnings of the court. *United States v. Bivona*, 487 F.2d 443 (2nd Cir. 1973); *United States v. White*, 486 F.2d 204 (2nd Cir. 1973); *United States v. Drummond*, 481 F.2d 62 (2nd Cir. 1973).

Perhaps if the case against Intersimone had been stronger, these improper comments would be of less significance. However, in an admittedly close case such as this, prosecutorial actions and misstatements take on greater importance, whether those actions and statements are intentional or not. The observations of the Supreme Court in *Berger v. United States*, 294 U.S. 78, 88 (1935) seem particularly appropriate in the instant case.

It should go without saying that successful—even zealous—prosecution does not require "improper suggestions, insinuations, and actions." *Berger, supra*, at

88. However, that was a lesson which was ignored below.

"Those who break our laws must be brought to account for their wrongs but it is imperative that they be brought to this accounting through an orderly procedure conducted in the spirit of justice. This court's first duty, then, is to insure that our laws are fairly enforced, or as Mr. Chief Justice Warren aptly put it: '(our duty) is to see that the waters of justice are not polluted.'" *Mesarosh v. United States*, 352 U.S. 1, 14 (1956).

The waters of justice have been polluted, and reversal, we believe, is the appropriate cure for the pollution in the instant case. *United States v. Banks*, 383 F. Supp., *supra*, at 397.

POINT SEVEN

Appellant was Denied a Trial by a Fair and Impartial Jury.

The Appellant alleges that owing to certain occurrences during the trial, his trial was based on the verdict of a less than fair and impartial jury possibly resulting in a conflict of interest on the part of trial counsel.

Appellant has previously filed a motion for unsealing and examination of certain minutes relating to the excusal of a trial juror and testimony relating to the same, which motion was denied by the trial court and is currently the subject of separate appellate review; therefore, Appellant is unable to perfect his record in this regard but feels the necessity to make the point at this time so as to preserve it for further timely review.

CONCLUSION

For the foregoing reasons, Intersimone's convictions should be reversed and the indictment dismissed.

Most respectfully submitted,

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